SUPREME COURT OF THE UNITED STATES

CITY OF MONROE ET AL. *v.* UNITED STATES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

No. 97–122. Decided November 17, 1997

JUSTICE SOUTER, dissenting, with whom JUSTICE BREYER joins.

In 1968 the Georgia legislature enacted a Municipal Election Code with the following provisions governing the alternatives of plurality and majority voting:

> "If the municipal charter . . . provides that a candidate may be nominated or elected by a plurality of the votes cast . . ., such provision shall prevail. Otherwise, no candidate shall be . . . elected to public office in any election unless such candidate shall have received a majority of the votes cast . . . ." Georgia Municipal Election Code, §34A-1407(a), 1968 Ga. Laws 977, as amended, Ga. Code Ann. §21–3–407(a) (1993).

These provisions were applicable in ways that would result in no changes in election practices in communities whose charters (so far as otherwise enforceable) provided that a plurality would suffice, whose charters provided that a majority was required, or whose charters were silent but whose practices had been to require a majority. The first sentence quoted from the Code (deferring to plurality provisions) would confirm the practice in the first class of municipalities, while the second sentence (a default provision requiring a majority in all other cases) would confirm the practices in the second and third classes. The new Code would, however, require a change in the practice in any community whose municipal charter (so far as otherwise enforceable) was silent on the plural-

ity-majority issue, but in which the practice had been to accept a plurality as sufficient.

The 1968 Code was submitted to the Attorney General of the United States for preclearance under §5 of the Voting Rights Act, 42 U. S. C. §1973c, (since the entire State of Georgia was, and remains, subject to §5), and the Attorney General approved the provisions in question. In two instances we have been presented with a question whether application of the default provision to effect a change in practice to majority voting was precleared by virtue of the blanket preclearance of the default provision. In the first case, *City of Rome* v. *United States*, 446 U. S. 156 (1980), we answered no; in the second case, this one, the answer should be the same.

In Rome's case, the charter provision that was valid and enforceable when the 1968 Code was precleared provided expressly for plurality voting. Therefore, the Code's deference provision applied and the plurality rule remained the rule under the Code. Rome argued, however, that the default provision should be applied so as effectively to validate an unprecleared 1966 municipal charter change to an express majority requirement. This Court rejected the argument in these words:

> "We also reject the appellants' argument that the majority vote, runoff election, and numbered posts provisions of the city's charter have already been precleared by the Attorney General because in 1968 the State of Georgia submitted, and the Attorney General precleared, a comprehensive Municipal Election Code that is now Title 34A of the Code of Georgia. Both the relevant regulation, 28 CFR §51.10 (1979), and the decisions of this Court require that the jurisdiction 'in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act,' *Allen* v. *State Board of Elections*, 393 U. S. 544, 571 (1969), and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction, see *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 137–138 (1978). Under this standard, the State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District Court noted, the State's submission informed the Attorney General only of 'its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts,' and 'did not . . . submit in an "unambiguous and recordable manner" all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues.' 472 F. Supp. 221, 233 (DC 1979)." 446 U. S., at 169–170, n. 6.

Since the Attorney General had never been shown Rome's 1966 municipal charter change (much less precleared it), he had never had an "adequate opportunity" to determine the purpose and effect of the proposed "electoral chang[e]" from plurality to majority, not in 1966 (because preclearance had not been sought) and not in 1968 (because he was not apprised of the purported 1966 change necessary to produce a majority vote requirement under the 1968 Code).

Monroe now claims the benefit of the 1968 Code's default provision, in circumstances just like Rome's, with one distinction. Monroe, too, obtained a 1966 charter change purporting to enact a majority requirement, for which Monroe, too, failed to seek preclearance. But Monroe could arguably enforce a majority requirement even if the 1966 unprecleared charter amendment were ignored, sim-

ply by applying the Code's default provision to the circumstances that preceded the unprecleared 1966 amendment: before that amendment, although Monroe's charter was silent on the plurality-majority issue, the municipal practice (perfectly valid for purposes of §5) was to accept a plurality as sufficient. Thus, the unprecleared 1966 charter change could be ignored in Monroe's case (as it was in Rome's) and the default provision of the 1968 Code would make Monroe a majority vote municipality.

As a predicate for applying the 1968 Code to effect majority voting requirements, however, this distinction between Rome's unprecleared 1966 change and Monroe's valid pre-1966 silent charter is not entitled to make any difference. The object of the preclearance requirement is, at a minimum, to apprise the Attorney General of any change in voting practice. Section 5 requires preclearance not only in the case of a change of a voting "standard" that was not in place when the Voting Rights Act took effect, but also of a change in a "practice" or "procedure." 42 U. S. C. §1973c. The point of the preclearance procedure is to determine whether the change proposed reflects either a "purpose" or will have the "effect" of forbidden abridgment of voting rights. *Ibid.* A new practice and a new effect could result not only from applying the Code's default provision to an invalid (because unprecleared) charter revision, but also from applying it to a perfectly valid charter provision and practice. In either case, on the sensible reasoning of *City of Rome*, there can be no preclearance of a new practice unless the Attorney General is unambiguously put on notice of it. See 446 U.S., at 169–170, n. 6. Thus, Monroe is in no different position from Rome. Neither Rome nor the State ever disclosed the 1966 charter change on which the default provision might operate to provide a new majority vote requirement; neither Monroe nor the State ever disclosed the pre-1966 charter silence on which the default provision might operate to

provide a new majority vote requirement. Alternative analyses, leading to the conclusion that the Attorney General's preclearance of the relevant section of the 1968 Code also precleared its undisclosed effects, are not only at odds with the unambiguous language of §5 of the Voting Rights Act, but imply that the Attorney General was quite the cavalier when he approved the default provision in 1968. Since no particular charter provisions were submitted to him along with the 1968 Code, *City of Rome*, *supra*, he was not on notice of any particular effect that might result from application of the default provision. It is therefore unreasonable to suppose that his approval of the Code was meant to preclear its undisclosed applications even as to otherwise valid charter provisions and municipal practices.*

* My analysis entails a modest but nonetheless discernable scope for the Attorney General's preclearance of the 1968 deferral and default provisions. The preclearance may have left the provisions enforceable insofar as they would result in ratification of prior, valid municipal practices (assuming that preclearance was necessary as to such applications); in any case, the preclearance amounted to findings that the default provision did not as such represent an intent to affect minority voting adversely, and that some applications of the provision would presumably be possible without adverse effects.